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IN THE

Supreme Court of the United States

October Term, 1961.

No. 343.

PETER T. DANA, et al.,

Petitioners,

v.

WILLIAM GOLDMAN THEATRES, INC., et al.

On Petition for Writs of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR TWENTIETH CENTURY-FOX FILM CORPORATION IN OPPOSITION.

WM. A. SCHNADER,
BERNARD G. SEGAL,
ARLIN M. ADAMS,
SAMUEL D. SLADE,
Attorneys for Respondent, Twentieth Century-Fox Film Corporation.

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia 2, Pennsylvania,
Of Counsel.

International, 711 So. 50th St., Phila. 43, Pa.

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BRIEF FOR TWENTIETH CENTURY-FOX FILM CORPORATION IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Common Pleas of Dauphin County (R. 79a-149a) [1] is reported at 75 Dauphin County Ct. 341 (Pa. 1960). The opinions of the Supreme Court of Pennsylvania (Pet. App. 31-89) are reported at 405 Pa. 83, 173 A. 2d 59 (1961).

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1. Throughout this brief in opposition, record references are to the printed Record filed in the Supreme Court of Pennsylvania in **Twentieth Century-Fox Film Corporation, et al. v. Charles H. Boehm, et al.** (No. 23, May Term, 1961).

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on July 26, 1961. The petition for a writ of certiorari was filed on August 22, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTION PRESENTED.

Whether this Court will review the holding of the Supreme Court of Pennsylvania that the Pennsylvania Motion Picture Control Act of 1959 is invalid as violative of the provisions of the Pennsylvania Constitution respectively guaranteeing free speech and the right to jury trial?

CONSTITUTIONAL PROVISIONS INVOLVED.

The controlling provisions of the Pennsylvania Constitution are:

1. Article I, Section 6:

> "Trial by jury shall be as heretofore, and the right thereof remain inviolate."

2. Article I, Section 7:

> "* * * The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. * * *"

3. Article I, Section 9:

> "In all criminal prosecutions the accused hath a right to * * * a speedy public trial by an impartial jury of the vicinage; * * * nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land."

STATEMENT.

Following the invalidation by the Pennsylvania Supreme Court of the Pennsylvania Motion Picture Censorship Act of 1915,[2] the Pennsylvania Legislature embarked upon a course to create "* * * movie censorship here in Pennsylvania again"[3] which culminated in the enactment of the Pennsylvania Motion Picture Control Act of 1959 (hereinafter called "the Act") (R. 9a-15a).

On November 30, 1959 (R. 1a), Twentieth Century-Fox Film Corporation filed a taxpayer's bill in the Court of Common Pleas of Dauphin County to restrain the Superintendent of Public Instruction, the Auditor General, and the State Treasurer of the Commonwealth of Pennsylvania from expending any funds from the State Treasury for the enforcement of the Act (R. 8a).[4] The complaint set forth many challenges to the validity of the legislation (R. 6a-7a), including the specific charges that the Act violated Article I, Section 7[5] and Article I, Section 6,[6] of the Pennsylvania Constitution (R. 6a, 20a-22a).

The Court of Common Pleas of Dauphin County found the Act invalid on many grounds and granted the relief sought (R. 79a-149a). That court specifically sustained the charges that the legislation violated the free speech and the trial by jury guarantees of the Pennsylvania Constitution (R. 112a-128a, 147a).[7]

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2. **Hallmark Productions, Inc. v. Carroll**, 384 Pa. 348, 121 A. 2d 584 (1956).

3. **Pennsylvania Legislative Journal**, 1957, Vol. 1, p. 115.

4. In view of the filing of the complaints in this case and the companion case of **William Goldman Theatres, et al. v. Peter T. Dana, et al.**, the Act has never been enforced.

5. *Supra*, p. 2.

6. *Ibid.*

7. The complaint also charged, *inter alia*, that the Act contained a concealed appropriation in violation of Article III, Sections 3 and 15 of the Pennsylvania Constitution, and also violated Article III, Section 3, in that the subject matter of the

The state officials appealed. On the appeal, this respondent continued to press as principal arguments—both in briefs and at oral argument—the assertions that the Act was invalid under the Pennsylvania Constitution.

The Supreme Court of Pennsylvania affirmed the judgments of the Court of Common Pleas of Dauphin County.

In the majority opinion of the Court, Chief Justice Jones said (Pet. App. 33):

> "* * * it is not open to question that motion pictures for public exhibition are entitled to the constitutional guarantee of free speech and free press. * * *"

Although he quoted from **Burstyn v. Wilson**, 343 U. S. 495, at page 502 (1952), he in no way limited this statement of the modern, enlightened, view of motion pictures as a medium of expression to the guarantees of free speech and free press under the Constitution of the United States. His statement would, of course, have been equally strong and equally correct had he not cited, or quoted from, any specific authority. In any event, petitioners did not challenge—either in the Court of Common Pleas of Dauphin County or in the Supreme Court of Pennsylvania—the accuracy of the proposition that expression by means of motion pictures is protected by Article I, Section 7 of the Pennsylvania Constitution.

Following this statement, Chief Justice Jones related in some detail (Pet. App. 34-36) the history of Article I, Section 7 of the Pennsylvania Constitution, showing that originally its flat statement that "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty" was specifically derived from

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Act was not clearly expressed in its title (R. 7a). The Court of Common Pleas of Dauphin County sustained these additional charges of invalidity under the Pennsylvania Constitution (R. 89a-91a, 101a-112a, 147a). The Supreme Court of Pennsylvania did not find it necessary to decide these questions.

Blackstone's Commentaries. He then outlined the provisions of the Act (Pet. App. 36-39) and concluded (Pet. App. 39):

> "The Act is clearly invalid on its face. It is designed to effect, in violation of Article I, Section 7, of the Pennsylvania Constitution, a pre-censorship of the exercise of the individual's right freely to communicate thoughts and opinions. • • •"

After another sentence, the Chief Justice continued (Pet. App. 40):

> "And, concomitantly, the Act offends, additionally, Article I, Sections 6 and 9 of the Pennsylvania Constitution. • • •"

He then proceeded to demonstrate (Pet. App. 40-42) how the Act offends these latter provisions of the Pennsylvania Constitution; the Act deprives persons accused of exhibiting a picture which has been administratively disapproved of their right to trial by jury.

Later in his opinion, in discussing the failure of the Act to afford procedural due process to persons who come within its scope, the Chief Justice stated (Pet. App. 43) that that Act offends not only the Fourteenth Amendment of the Constitution of the United States, but also the "law of the land" provision of Article I, Section 9 of the Pennsylvania Constitution.

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ARGUMENT.

It is well settled that this Court will not review the judgment of a state court which rests upon an adequate non-federal ground. **Murdock v. City of Memphis**, 20 Wall. 590 (1874); **Fox Film Corp. v. Muller**, 296 U. S. 207 (1935); **Herb v. Pitcairn**, 324 U. S. 117 (1945). See 95 U. of Pa. L. Rev. 764; 74 Harv. L. Rev. 1375. And it is clear beyond question that this principle is here controlling.

In this case, the Supreme Court of Pennsylvania has carefully analyzed a state statute designed to impose a censorship scheme and has found the Act fatally defective for numerous reasons.

Contrary to petitioners' assertion (Pet. 17), the grounds for decision based upon the Pennsylvania Constitution are in no sense "interwoven" with, or dependent upon, federal law. Rather the grounds relied upon by the court below are broad, cumulative, grounds, any one of which is sufficient to invalidate the whole statute. There is no basis for review by this Court.

1. The language of Article I, Section 7 of the Pennsylvania Constitution is far more specific as relating to "prior restraints" than is the language of the First Amendment of the Constitution of the United States.[8]

The First Amendment provides only that:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

On the other hand, as we have already shown, the Pennsylvania Constitution in Article I, Section 7 specifically states:

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8. For a careful and well-reasoned analysis of this distinction between the two provisions, see **State v. Jackson**, 356 P. 2d 495, 499-502 (Or., 1960).

"* * * every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. * * *"

This respondent contended before the Supreme Court of Pennsylvania, with all the vigor at its command, that the language of the Pennsylvania Constitution must be applied exactly as it reads; that there is no room for interpreting this language so as to permit a prior restraint of any kind.

A majority of the Supreme Court of Pennsylvania agreed with this view (see especially Pet. App. 34).[9] To reach its conclusion, the majority did not require the aid of any federal law. The mere citation of the **Burstyn** case by Chief Justice Jones is certainly of no importance, for the petitioners did not contend that motion pictures were not protected by Article I, Section 7 of the Pennsylvania Constitution.

Clearly, the Supreme Court of Pennsylvania interpreted and applied Article I, Section 7 of the Constitution of Pennsylvania in the instant case independently of federal law.

2. It is equally clear that in holding that the Act violates Article I, Sections 6 and 9 of the Pennsylvania Constitution,—in that it deprives citizens of Pennsylvania accused of exhibiting "obscene" motion pictures of trial by jury,—the court below was applying Pennsylvania law and only Pennsylvania law to reach its conclusion (Pet. App. 40-42). As in the case of its interpretation of Article I, Section 7, the Supreme Court of Pennsylvania did not require the help of federal constitutional or statutory provisions or federal decisions. Petitioners make no real attempt to meet this point. Their reliance (Pet. 26-27) on decisions

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9. "* * * This provision is a direct inhibition on previous restraint of an exercise of the protected rights * * *."

under the due process clause of the Constitution of the United States is misplaced.

3. The Supreme Court of Pennsylvania also held, *inter alia*, that the Act empowered the censorship board to disapprove motion pictures "* * * without any hearing or any opportunity for any person to present testimony of any kind regarding the contents of the film, reel or view, or the contemporary community standards to be applied in judging it, or any other relevant matter * * *" (Pet. App. 47), and that a person appealing from an adverse decision of the board would have the burden of showing that the board acted arbitrarily or capriciously (Pet. App. 48-49). The court held that this constituted "* * * a flagrant violation of procedural due process" (Pet. App. 51). Petitioners do not quarrel with the court's holding that the Act, as construed, violates procedural due process (Pet. 28). Rather, they contend that the court placed an erroneous construction on the statutory provisions, which are silent with respect to hearing and burden of persuasion (Pet. 28-29). What petitioners are, in reality, asking is that this Court grant certiorari because of petitioners' disagreement with the Supreme Court of Pennsylvania as to the meaning of the Act. However, it is well settled that the construction of a state statute is for the state courts. See, for example, **Chicago, M. St. P. & Pac. R. R. v. Risty**, 276 U. S. 567, 570 (1928); **Winters v. New York**, 333 U. S. 507, 514 (1948). Thus, here too, the decision below rests on an adequate non-federal ground.

CONCLUSION.

It is obvious that the judgment of the Supreme Court of Pennsylvania rests upon adequate non-federal grounds, even though that court also discussed the validity of the Act under certain provisions of the Constitution of the United States. Under these circumstances, it is respectfully submitted that the petition for certiorari should be denied.

WM. A. SCHNADER,
BERNARD G. SEGAL,
ARLIN M. ADAMS,
SAMUEL D. SLADE,
Attorneys for Respondent, Twentieth Century-Fox Film Corporation.

SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia 2, Pennsylvania,
Of Counsel.